No. 85-1233 (9)

In The
Supreme Court of the United States
October Term, 1985

INTERNATIONAL PAPER COMPANY,
Petitioner,

v.

HARMEL OUELLETTE and LILA OUELLETTE, CLIFTON BROWNE and EDLA BROWNE, ALDEE PLOUFFE and SHIRLEY PLOUFFE, individually, on behalf of themselves, and on behalf of all similarly situated plaintiffs, H. VAUGHN GRIFFIN, SR., ARDATH GRIFFIN, ALAN THORNDIKE and ELLEN THORNDIKE, WESLEY C. LARRABEE and VIRGINIA LARRABEE, F. ALFRED PATTERSON, JR., and LOIS T. PATTERSON,
Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF OF RESPONDENTS

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QUESTION PRESENTED

Does the Federal Water Pollution Control Act preempt an action by property owners, in the Vermont federal district court under Vermont common law, for damages to their Vermont lakeshore properties caused by the discharge of pollutants into the boundary waters between New York and Vermont by a private business enterprise located in New York?

TABLE OF CONTENTS

TABLE OF AUTHORITIES

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

STATUTES AND RULES

TABLE OF AUTHORITIES—Continued

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BRIEF OF RESPONDENTS

Respondents Harmel Ouellette and Lila Ouellette, *et al.* ('Respondents'), respectfully pray that this Court affirm the judgment of the United States Court of Appeals for the Second Circuit, which affirmed *per curiam* the decision of the United States District Court for the District of Vermont (Honorable Albert W. Coffrin, Chief Judge), entered February 5, 1985.

STATUTE AND RULES INVOLVED

In addition to the Statutes cited by Petitioner, Respondents also cite Section 101 of the Federal Water Pollution Control Act ("FWPCA"), 33 U.S.C. § 1251 and 40 C.F.R. § 122.5(c), which are set forth verbatim in the Supplemental Appendix to Respondents' Brief (App. 1-4).

COUNTERSTATEMENT OF THE CASE

Prior Proceedings

In 1970, the State of Vermont brought an original action in this Court against the State of New York and International Paper Company ("IPCo."), for pollution discharges into Ticonderoga Creek from Petitioner's "Old Mill," a kraft paper mill located within the Village of Ticonderoga, New York. The United States, through the Environmental Protection Agency ("EPA"), intervened. At the time the lawsuit was brought, the Old Mill had discontinued operations and the "New Mill" (which is the subject of the instant action) was then under construction, at a site four miles north of Ticonderoga. *Vermont v. New York,* 406 U.S. 186 (1972), 408 U.S. 917 (1972), 409 U.S. 1103 (1973).

After trial before a Special Master, Vermont, New York, EPA and IPCo. agreed on a proposed settlement The proposal, however, was rejected by the Supreme Court on the grounds that it required ongoing supervision by the Court. 417 U.S. 270 (1974). A new settlement, embodied in two agreements known as the Two-Party Agreement (between Vermont and IPCo.) (JA 88)[1] and the Four-Party Agreement (between Vermont, New York, EPA, and IPCo.) (JA 121), called for the lawsuit to be dismissed without prejudice (JA 89, 122-23), and this Court did so. 419 U.S. 955 (1974).

By these agreements, the State of Vermont consented not to sue for any damages to its waters, shores, adjacent areas and atmosphere occurring *prior* to the date the amended complaint was dismissed (October 29, 1974) (JA 96, 128-29). It also agreed not to propose a limitation in the *first* National Pollutant Discharge Elimination System ("NPDES") permit for certain pollutants stricter than those set forth in the settlement agreements (JA 98-99, 113).

However, the parties specifically agreed that:

> Nothing herein shall be construed as affecting any claims or right of any citizens or residents of the State of Vermont that may exist against any party to No. 50, Original.

¶ IV(F) of the Two-Party Agreement (JA 101). The Four-Party Agreement contained an almost identical provision. ¶ VI(F)(JA 135). The Four-Party Agreement also provided:

> Any issues or claims not resolved by this Agreement, or the two-party agreement, may be asserted in any forum having jurisdiction.

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[1] "JA" citations are to the Joint Appendix filed on May 2, 1986. "A" citations are to the Appendix contained in Petitioner's Petition for Certiorari, filed with this Court on January 22, 1986.

¶ VI(H) (JA 135). The Second Circuit rejected Petitioner's argument, not renewed here, that these agreements somehow foreclosed the claims set forth in this lawsuit (A 3).

The Present Proceedings

Respondents are 162 owners of lands on the shores of Lake Champlain within the towns of Shoreham, Bridport and Addison, Vermont (JA 45). Respondents use their properties primarily for residential and recreational purposes, but also for certain commercial uses such as rental cottages. The State of Vermont, as a landowner, is a member of this class action and appears through its Attorney General (JA 17). Petitioner is a New York corporation with its principal place of business in New York, and is registered to do business in the State of Vermont (JA 27-28,38). It owns and operates the New Mill, a kraft paper mill on the New York shores of Lake Champlain, across the lake from Respondents' properties.

Lake Champlain is a navigable body of water and is the largest fresh water lake east of the Great Lakes. It extends from Whitehall, New York, into Canada. The Vermont-New York border is the middle of the deepest channel of Lake Champlain. "An Act . . . Declaring What Shall be the Boundary Line Between the State of Vermont and the State of New York . . . ." *Vermont Laws of 1790;* N.Y. State Law, § 4 (McKinney 1984).

Petitioner discharges wastes from its mill into Lake Champlain through a diffusion pipe. The location of the pipe, running in a straight line through New York waters toward Vermont and ending approximately 200 feet from Vermont waters, is shown on two maps at JA 197-98.

This suit was instituted in 1978, in Vermont state court as a class action, seeking common law remedies for losses resulting from water and air pollution caused by Petitioner's mill. Over Respondents' objection, Petitioner removed the action to the United States District Court for the District of Vermont, pursuant to 28 U.S.C. § 1441(a) (JA 1-3, 46).

In the first cause of action, Respondents seek relief from discharges of pulp- and paper-making wastes which are "foul, unhealthy, smelly, and aesthetically unpleasing and discolor the waters in, around and adjacent to Respondents' lakeshore properties, and the lakeshore properties of other members of the class, make said waters turbid, and make them unfit for recreational use" (JA 29). These discharges "interfere with [Respondents'] use and enjoyment of their property and have diminished and will continue to diminish the fair market value and rental value of their property" (JA 29).

Count I alleges that discharges from Petitioner's mill into Lake Champlain constitute a "continuing nuisance" (JA 29); Count II alleges that Petitioner has violated its NPDES permit by discharging pollutants into the Lake in excess of the amounts specified in the permit[2] (JA 29-31); Count III alleges that Petitioner's discharges constitute an unreasonable riparian use (JA 31-32); Count IV alleges that its discharges are negligent (JA 32-33); and Count V alleges that such discharges are malicious, willful, and un-

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[2]Petitioner's contention that it has not violated its permit is not supported by the present record, which shows violations of the permit pursuant to the ECSL and other violations, as well (JA 68-70). Respondents stand ready to prove additional violations at trial.

dertaken with reckless and wanton disregard of Respondents' rights (JA 33-34). Respondents seek compensatory and punitive damages, as well as injunctive relief (JA 29-34, 43-44; A 9). Respondents' second cause of action concerns air pollution (JA 34-37), and is not at issue here.

On June 22, 1981, Petitioner moved for dismissal and summary judgment on Respondents' first cause of action, pursuant to Rules 12(c) and 56(b) of the Federal Rules of Civil Procedure (JA 13). On February 5, 1985, Chief Judge Coffrin denied Petitioner's motion. *Ouellette v. International Paper Co.*, 602 F.Supp. 264 (D.Vt. 1985) (*"Ouellette"*) (A 18).

Chief Judge Coffrin ruled that the FWPCA, 33 U.S.C. §§ 1251 *et seq.*, did not preempt this common law nuisance action, under Vermont law, between private parties alleging injuries arising out of water pollution. The court thoroughly analyzed the language and legislative history of the statute, this Court's decisions in *Illinois v. Milwaukee*, 406 U.S. 91 (1972) (*"Milwaukee I"*), and *Milwaukee v. Illinois*, 451 U.S. 304 (1981) (*"Milwaukee II"*), and the Seventh Circuit's opinion in *Illinois v. Milwaukee*, 731 F.2d 403 (7th Cir. 1984), *as amended*, Nos. 77-2246 and 81-2236 (7th Cir. May 29, 1984), *cert. denied sub nom. Scott v. City of Hammond*, 105 S.Ct. 979 (1985) (*"Milwaukee III"*). Based on such analysis, Chief Judge Coffrin concluded that nothing in the FWPCA or the common law impairs the longstanding rights of private persons, injured by the out-of-state actions of private entities, to sue in the state of injury for resulting harm.

Petitioner argued the applicability of *Milwaukee III*, involving suits by and between states and their political subdivisions.[3] There, the Seventh Circuit held that the FWPCA precludes the application of one state's common or statutory law to determine liability and afford a remedy for discharges in another state. *Id.*, 731 F.2d at 414. Chief Judge Coffrin rejected this argument. He first noted the significant difference in the posture of the parties to each action: *Milwaukee III* involved suits between quasi-sovereign entities, while the instant action is solely between private parties. *Ouellette*, 602 F.Supp. at 271 (A 18). Thus, Chief Judge Coffrin found that, unlike the case in *Milwaukee III*, here "[t]here is little or no possibility that this litigation will escalate into a conflict between different state entities." *Id.* (footnote omitted) (A 18).

Chief Judge Coffrin further distinguished the instant case by pointing out that "the common law action involved here does not directly implicate the regulatory powers of the states in which the parties are located." *Id.* (A 18). He noted that Respondents are not seeking to impose "legislatively defined standards or limitations" on Petitioner, which was precisely the relief sought by the State of Illinois. *Milwaukee III*, 731 F.2d at 407. Here, Respondents seek

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[3]The *Milwaukee III* decision involved three actions consolidated on appeal, two by the State of Illinois against several Wisconsin cities and municipal corporations, and the other a putative class action suit brought by Illinois citizen William J. Scott, against other Wisconsin cities and political subdivisions. 731 F.2d at 404-06. As the Seventh Circuit pointed out, "[i]t may well be significant . . . that, except for the case in which Scott is Plaintiff, these are attempts by a state to regulate municipalities of another state in the discharge of their public responsibilities." *Id.* at 407. Notably, Scott's complaint was then dismissed by the Seventh Circuit, on the ground that he had suffered insufficient harm to confer standing. *Id.* at 414-15.

only compensation for injuries to, and protection against interference with, the use and enjoyment of their properties. *Ouellette,* 602 F.Supp. at 271 (A 18). "A state's nuisance law develops not to regulate the activity of neighboring states but to protect the health, welfare, and property rights of its own residents." *Id.* at 271-72 (A 19). The court stressed that affording citizens such relief is a uniquely local concern, traditionally founded on state law. *Id.* at 270 (A 15).

Quite apart from these important factual distinctions, Chief Judge Coffrin also rejected the legal analysis employed by the Seventh Circuit. Although describing the *Milwaukee III* decision as "an admirable attempt to deal with the difficult issues concerning the role of state law in controlling the pollution of interstate water," *id.* at 268 (A 10), Chief Judge Coffrin nevertheless characterized that court's conclusions as "logically inconsistent" and "inherently contradictory," *id.* at 270-71 (A 16-17), since nothing in this Court's decisions, the FWPCA, or the Act's underlying policies, supports the application of the common law of the state in which the polluter is located, while mandating the wholesale preemption of the law of the affected state.

For all the foregoing reasons, Chief Judge Coffrin declined to follow the holding of *Milwaukee III,* and denied Petitioner's motion to dismiss Respondents' first cause of action. On May 20, 1985, Chief Judge Coffrin certified for interlocutory appeal three issues[4] pursuant

[4]These three issues were: (1) whether the FWPCA preempts this common law action; (2) whether the settlement agreements entered into by the State of Vermont in *Vermont v. New York,* 419 U.S. 955 (1974), barred this action; and (3) whether Respondents have standing to sue under general nuisance law. (A 2). The court of appeals affirmed on all three issues. (A 3).

to 28 U.S.C. § 1292(b), and stayed all further proceedings with respect to the first cause of action, pending the decision by the court of appeals (JA 20).

The court accepted Petitioner's interlocutory appeal, and thereafter affirmed the district court's denial of Petitioner's motion to dismiss in a brief *per curiam* opinion, "essentially for the reasons set forth in [the district court's] thorough opinion which we adopt in all [relevant] respects . . ." (A 3). Petitioner seeks review of the court of appeals' decision only on the first of these three certified issues.

SUMMARY OF ARGUMENT

The courts below correctly ruled that the FWPCA, 33 U.S.C. §§ 1251 *et seq.*, did not preempt state common law nuisance actions between private parties involving injuries arising out of interstate water pollution. The courts thoroughly analyzed the language and legislative history of the statute, this Court's decisions in *Milwaukee I* and *Milwaukee II,* and the Seventh Circuit's opinion in *Milwaukee III,* and concluded that nothing in the FWPCA or the common law impairs the longstanding rights of private persons, injured by the out-of-state actions of private entities, to sue in the state of injury for resulting harm.

Petitioner's first argument, that such a result interferes impermissibly with the dictates of federalism, lacks merit. Pet.Br.8.[5] Concerns of state sovereignty simply

[5]"Pet.Br." citations are to the Brief of the Petitioner, filed with this Court on May 19, 1986.

do not arise where private parties sue each other for injuries resulting from wrongful conduct. State law has historically been relied upon to resolve such interstate disputes, without implicating concerns of federalism. Equally unconvincing is Petitioner's argument that permitting Respondents to seek state common law remedies causes unwarranted interference with the regulatory scheme. Pet.Br.7 Respondents are not seeking to regulate Petitioner's activities; rather, they are simply utilizing traditional private remedies to redress the injuries caused by Petitioner's conduct. This Court's decisions in *Milwaukee I* and *Milwaukee II* require no different result.

Secondly, the FWPCA did not preempt this common law suit based on Vermont nuisance law. Nothing in the Act expressly preempts such relief. Indeed, the Act and its legislative history expressly preserves state law remedies. Further, applying the preemption analysis this Court has prescribed, preservation of Vermont common law to redress pollution-caused injuries neither renders compliance with the Act impossible, nor impedes the realization of the Act's full purposes and objectives; rather, such remedies complement those objectives.

Third, Respondents agree with the legal analysis employed by the United States, through the Brief of the Solicitor General, insofar as it concludes that Respondents' common law remedies are not preempted by the FWPCA or the decisions of this Court. However, to the extent that the Solicitor General argues that Respondents' prayers for punitive damages and injunctive relief are governed by New York rather than Vermont common law, Respondents disagree, and maintain that Vermont common law is applicable to the entire action.

Finally, there is nothing in the Act or the common law to support Petitioner's novel claim that Respondents may not seek relief in Vermont, where the injuries occurred. Quite the contrary, a Vermont federal court exercising diversity jurisdiction is a wholly appropriate forum for this action.

ARGUMENT

I. INDIVIDUAL CITIZENS' HISTORIC INTEREST IN OBTAINING REDRESS FOR INJURIES CAUSED BY THE WRONGFUL ACTS OF OTHERS REMAINS UNAFFECTED BY THE DECISIONS IN MILWAUKEE I AND MILWAUKEE II.

Brought by Vermont property owners against a New York corporation registered to do business in Vermont,[6] this quite ordinary lawsuit sounding, ***inter alia***, in nuisance and negligence, arises out of real and tangible injuries to Respondents' health, and to their use and enjoyment of their Vermont properties, caused by Petitioner's pollution-generating activities. Although Petitioner's liability stems from its activities on the New York shores of Lake Champlain, the injuries indisputably occurred in Vermont, approximately one to two miles across the Lake (JA 197, 198). Petitioner's attempts to exploit the interstate aspect of this litigation and characterize it as raising prohibitive concerns of federalism are obfuscatory and without merit. Indeed, to disable Vermont courts from hearing this ac-

[6] *See generally* 11 V.S.A. §§ 2101-2110 (1984), and 12 V.S.A. §§ 851-858 (1973 & Supp. 1985), establishing that by registering to do business in Vermont, Petitioner has tacitly consented to the jurisdiction of Vermont courts for actions to redress injuries which occur in Vermont.

tion, and to require deferral to New York courts, would offend the basic tenet of federalism: equality among sovereign states.

Preliminarily, it should be understood that under both New York and Vermont choice-of-law principles, Vermont common law would apply to this action.[7] *Cousins v. Instrument Flyers, Inc.*, 44 N.Y.2d 698, 699, 376 N.E.2d 914, 915 (1978); *Ouellette*, 602 F.Supp. at 270 (A 16); *Marra v. Bushee*, 447 F.2d 1282, 1283 (D.Vt. 1971). Thus, it is only if some federal principle dictates application of New York law that it can be applied. Respondents maintain that no such federal principle exists, and that Vermont law therefore governs.

It is beyond dispute that citizens have historically sought judicial redress in the courts and under the laws

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[7]Chief Judge Coffrin rejected the Seventh Circuit analysis that would have looked to New York choice-of-law principles to determine which jurisdiction's common law applied:

> The Seventh Circuit's position . . . creates a choice-of-law rule that deviates, without legislative authorization, from well-settled choice of law principles. [*Milwaukee III*] would, in settling disputes over interstate pollution, mandate that, where state law was sought to be applied, courts apply the law of the state from which the pollution emanates regardless of the states' choice-of-law principles. Yet the FWPCA provides no support for this deviation from the rule that, in a diversity case, a federal court must apply choice of law principles of the state in which the court sits. *Klaxon v. Stentor Elec. Mfg. Co.*, 313 U.S. 487 (1941) . . . . *See also Day v. Zimmerman, Inc. v. Challoner*, 423 U.S. 3, 4 (1975) ("A federal court is not free to engraft onto those state rules exceptions or modifications which may commend themselves to the federal court, but which have not commended themselves to the State in which the federal court sits.).

Ouellette, 602 F.Supp. at 270 and n.4 (A 16).

of the state of injury, even though the initiating action may occur in another state.[8] The invocation of state law in such instances does not conflict with, or even implicate, concerns of federalism:

> A person who sets in motion in one state the means by which injury is inflicted in another may, consistently with the due process clause, be made liable for that injury whether the means employed be a responsible agent or an irresponsible instrument. The cases are many in which a person acting outside the state may be held responsible according to the law of the state for injurious consequences within it. Thus, liability is commonly imposed under such circumstances for homicide, for maintenance of a nuisance, for blasting operations, and for negligent manufacture.

Young v. Masci, 289 U.S. 253, 258-59 (1933) (citations omitted).

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[8]*See generally Keeton v. Hustler Magazine, Inc.*, 465 U.S. 770 (1984) (allowing libel suit in New Hampshire notwithstanding fact that neither party resided there and only few copies of offending magazine were circulated there, since New Hampshire had significant interest in redressing injuries occurring within state); *Nevada v. Hall*, 440 U.S. 410, 422-23 (1979) (full faith and credit clause no bar to suit in California court, under California law, against State of Nevada by California residents injured in California); *Watson v. Employers Liability Assurance Corp., Ltd.*, 348 U.S. 66, 72-74 (1954) (Louisiana not precluded from applying its own statute authorizing direct action against liability insurer for injuries occurring in that state, although policy sued on was negotiated and issued in Massachusetts); *Pacific Employers Insurance Co. v. Industrial Accident Commission of California*, 306 U.S. 493, 502-03 (1939) (California not precluded from applying its own worker's compensation act to injury of Massachusetts employee working in California); *Young v. Masci*, 289 U.S. 253, 258-59 (1933) (New York may apply own statute making New Jersey owner of automobile liable for negligence of agent operating automobile in New York); *MacPherson v. Buick Motor Co.*, 217 N.Y. 382 (1916) (Michigan automobile manufacturer liable to ultimate purchaser injured in New York due to design defects).

Indeed, the protection of citizens against unwarranted injuries to their persons or properties, from pollution-generating activities or otherwise, is uniquely within the police power of the states, enforced in part through the application of state common law remedies. *Hillsborough County, Fla. v. Automated Medical Laboratories, Inc.*, 105 S.Ct. 2371, 2378 (1985) (health and safety matters, here regulation of blood donor centers, "primarily, and historically, a matter of local concern") (quoting *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947)); *Askew v. American Waterways Operators, Inc.*, 411 U.S. 325, 328, 343 (1973) ("[s]ea-to-shore pollution [is] historically within the reach of the police power of the States"); *Ohio v. Wyandotte Chemicals Corp.*, 401 U.S. 493, 497-98, 510 (1971) (state law appropriate remedy for interstate water pollution, as exercise of police power); *Huron Portland Cement Co. v. Detroit*, 362 U.S. 440, 442 (1960) (regulation of pollution-generating activities and provision of tort remedies uniquely within state's police powers).[9] As such, Petitioner clearly "may be held responsible according to the law of [Vermont] for injurious con-

[9]See generally *Stoddard v. Western Carolina Regional Sewer Auth.*, 784 F.2d 1200, 1207 (4th Cir. 1986); *Jackson v. Johns-Manville Sales Corp.*, 750 F.2d 1314, 1325 (5th Cir. 1985); *Bass River Associates v. Mayor of Bass River Township*, 743 F.2d 159, 162 (3d Cir. 1984); *Ferebee v. Chevron Chemical Co.*, 736 F.2d 1529, 1542 (D.C.Cir. 1984), *cert. denied*, 105 S.Ct. 545 (1985); *Chevron U.S.A., Inc. v. Hammond*, 726 F.2d 483, 488 (9th Cir. 1984), *cert. denied sub nom. Chevron U.S.A., Inc. v. Sheffield*, 105 S.Ct. 2686 (1985).

sequences" which occur here. *Young v. Masci, supra*, 289 U.S. at 259.[10]

The fact that Petitioner has chosen a navigable and interstate body of water into which to discharge its effluent does not deprive Respondents of their common law right to sue privately for negligence or the maintenance of a nuisance. Petitioner's argument, based on its reading of *Milwaukee I* and *Milwaukee II*, that prohibitive concerns of federalism require dismissal of this action, simply does not withstand close analysis.[11] Those cases, involving disputes between quasi-sovereigns seeking to regulate each other's water-polluting activities, are wholly inapposite to the private dispute at hand.

In *Milwaukee I*, this Court held that federal common law was available to a sovereign state suing the political subdivisions of another state, where the former sought to regulate the latter's pollution-causing activities in interstate waters. *Id.*, 406 U.S. at 93, 104-05. *See also Milwaukee II*, 451 U.S. at 309. As more fully explained in *Milwaukee II*, however, this Court resorted to the federal common law of nuisance as a "necessary expedient," *id.*, 451 U.S. at 314, only because in *Milwaukee I* the dictates of federalism precluded Illinois from pursuing, in state court, its claims as a quasi-sovereign against the political

[10]As the United States points out, Petitioner has itself repeatedly maintained that it would be subject to suit in Vermont, under Vermont law, for injuries it causes to Vermont property owners. U.S.Br. 7-10 and nn. 6-11.

[11]This argument also contradicts the previous position taken by Petitioner. *See* n.10, *supra*.

subdivisions of a sister state.[12] *Milwaukee I*, 406 U.S. at 94-98, 104; *Milwaukee II*, 451 U.S. at 309, 325. *See also Missouri v. Illinois*, 180 U.S. 206, 241 (1901) (cited in *Milwaukee I*).

Since no adequate federal statutory remedy then existed, *Milwaukee I*, 406 U.S. at 103, federal common law provided the sole means by which Illinois could seek the abatement and regulation of interstate pollution in federal court, the only forum available to it outside the original jurisdiction of this Court. *Milwaukee I*, 406 U.S. at 94-98, 104; *Milwaukee II*, 451 U.S. at 313-14. *See generally*, S. Bleiweiss, *Environmental Regulation and the Federal Common Law of Nuisance: A Proposed Standard of Preemption*, 7 Harv.Envtl.L.Rev. 41, 44-45 and n.36 (1983) (hereafter "Bleiweiss"). This Court admonished, however, that resort to federal common law was an extraordinary remedy, to be used only in a "few and restricted instances."[13] *Milwaukee II*, 451 U.S. at 313 (quoting *Com-*

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[12]"In this regard we note the inconsistency in Illinois' argument and the decision of the District Court that both federal and state nuisance law apply to this case. If state law can be applied, there is no need for federal common law; if federal common law exists, it is because state law cannot be used." *Milwaukee II*, 451 U.S. at 314 n.7.

[13]It should be noted that *Milwaukee I* did not address the question of whether this newly recognized federal common law would be available to private parties, or only to sovereigns. Indeed, only the Third Circuit's opinion in *National Sea Clammers Ass'n v. City of New York*, 616 F.2d 1222 (3rd Cir. 1980), *vacated and remanded sub nom. Middlesex County Sewerage*

(Continued on following page)

mittee for Consideration of Jones Falls Sewage System v. Train, 539 F.2d 1006, 1008 (4th Cir. 1976), and *Wheeldin v. Wheeler*, 373 U.S. 647, 651 (1963)).

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Authority v. National Sea Clammers Ass'n, 453 U.S. 1 (1981), clearly indicated that private parties could utilize such law. *Id.*, 616 F.2d at 1235. Although certiorari was granted in the *Middlesex County* case, before the case was decided this Court handed down its decision in *Milwaukee II*, holding federal common law preempted by the FWPCA. Thus, the question of whether private parties could raise questions of federal common law was moot. *Middlesex County Sewerage Authority v. National Sea Clammers Ass'n, supra*, 453 U.S. at 11 n.17 ("We therefore need not discuss the question whether the federal common law of nuisance could ever be the basis of a suit for damages by a private party."). *See also id.* at 21. Thus, it is unclear whether federal common law was ever available to Respondents.

Disagreeing with the Third Circuit's decision, and holding instead that private litigants have no claim under federal common law, were the following: *Committee for Consideration of Jones Falls Sewage System v. Train*, 539 F.2d 1006, 1009 (4th Cir. 1976) ("In controversies such as this one, there is present neither the reason nor the necessity for the invocation of a body of federal common law which was present in *Illinois v. Milwaukee.*"); *Township of Long Beach v. City of New York*, 445 F.Supp. 1203, 1213 (D.N.J. 1978) ("It is agreed that the decision in [*Milwaukee I*] should not be extended to encompass an action by a private person."); *Parsell v. Shell Oil Co.*, 421 F.Supp. 1275, 1281 (D.Conn. 1976), *aff'd. without opinion*, 573 F.2d 1289 (2d Cir. 1977) (federal cause of action for nuisance "has not been extended to suits brought by private plaintiffs"). *See generally* R. Glicksman, *Federal Preemption and Private Legal Remedies for Pollution*, 134 U.Penn.L.Rev. 121, 158 n. 198 (1985) (hereafter "Glicksman"); R. Lutz, *Interstate Environmental Law: Federalism Bordering on Neglect?*, 15 Land Use & Env't L.Rev. 569, 606-07, and n.202 (1984) (hereafter "Lutz"); S. Bleiweiss, *Environmental Regulation and the Federal Common Law of Nuisance: A Proposed Standard of Preemption*, 7 Harv.Envtl.L.Rev. 41, 47-48 (1983) (hereafter "Bleiweiss"); C. Dexter and T. Schwarzenbart, *City of Milwaukee v. Illinois: The Demise of the Federal Common Law of Water Pollution*, 1982 Wis.L.Rev. 627, 637-38, 663 (hereafter "Dexter").

Thus, in *Milwaukee I*, this Court had neither reason nor occasion to discuss the continued existence of state common law remedies in cases where such remedies would otherwise be available—that is, in cases not between quasi-sovereigns seeking regulatory authority, but between private persons suing other private entities for injuries to themselves or to their property. The limited nature of the *Milwaukee I* holding was made even clearer in this Court's subsequent opinion in *Milwaukee II*. There, the Court held that the recently recognized federal common law of nuisance had been preempted by the intervening passage of the FWPCA, which provided precisely the sort of federal regulatory scheme for limiting interstate water pollution Illinois had sought in its earlier suit. *Id.*, 451 U.S. at 319-20. Illinois no longer had to resort to the "necessary expedient" of federal common law, since applicable federal statutory law was now available, thus insuring access to a federal court forum. *Id.*

Indeed, in *Milwaukee II* this Court implicitly acknowledged the continued vitality of state common law remedies in suits between private parties.[14] The Court reiterated that federal courts, unlike state courts, "do not possess a general power to develop and apply their own rules of decision." *Id.*, 451 U.S. at 312. Rather,

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[14]Since the only issue on which certiorari was granted in *Milwaukee II* was whether the FWPCA preempted federal common law, this Court did not address the issue of state common law remedies. This Court subsequently denied Illinois' petition for certiorari challenging the Seventh Circuit's refusal to consider petitioner's claims under state common law. *Illinois v. Milwaukee*, 599 F.2d 151 (7th Cir. 1979), *Illinois' petition for cert. denied*, 451 U.S. 982 (1981).

> [t]he enactment of a federal rule in an area of national concern, and the decision whether to displace state law in doing so, is generally made not by the federal judiciary, purposefully insulated from democratic pressures, but by the people through their elected representatives in Congress.

Id. at 312-13 (citations omitted). Federal common law is therefore far more easily preempted by the passage of a federal statute than is state law. *Id.* at 316.

This Court then made clear that its preemption analysis was not to be construed as affecting state common law:

> [T]he appropriate analysis in determining if federal statutory law governs a question previously the subject of federal common law is not the same as that employed in deciding if federal law preempts state law. In considering the latter question "*'we start with the assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress.'*"

Id. (quoting *Jones v. Rath Packing Co.*, 430 U.S. 519, 525 (1977) and *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 219, 230 (1947)) (emphasis added). This admonition was repeated in a footnote:

> Since the States are represented in Congress but not in the federal courts, the very concerns about displacing state law which counsel against finding preemption of *state* law in the absence of clear intent actually suggest a willingness to find congressional displacement of *federal* common law. *Simply because the opinion in Illinois v. Milwaukee used the term "preemption," usually employed in determining if federal law displaces state law, is not reason to assume the analysis used to decide the usual federal-state questions is appropriate here.*

Id. at 317 n.9 (emphasis partly in original, partly added). *See also id.* at 316-17, and 319 n.14.

Clearly, then, nothing in *Milwaukee I or Milwaukee II* limits in any way Respondents' historic right to rely on state law to redress the injuries alleged in this action. Although extenuating circumstances made the creation of a federal common law doctrine of nuisance appropriate for use in suits between quasi-sovereign entities, and while such suits may continue to require special treatment, these constraints simply do not exist where private parties seek redress against other private parties, under their own state law, for pollution-causing injuries. Therefore, the lower courts correctly denied Petitioner's motion to dismiss on this ground, and their rulings should be affirmed.

II. THE FWPCA DOES NOT PREEMPT STATE COMMON LAW REMEDIES FOR SUITS BETWEEN PRIVATE PARTIES.

The foregoing makes clear that, despite Petitioner's contrary arguments, decisions of this Court do not impair the longstanding rights of Respondents to seek redress for injuries caused by Petitioner's pollution of Lake Champlain, under Vermont common law. Petitioner's next argument, that the FWPCA itself preempts such rights, does not withstand scrutiny.

First, as this Court has repeatedly warned, it is presumed that federal statutory law does not preempt state common law unless Congress has clearly and manifestly indicated its intention to do so. This presumption applies with full force to the FWPCA. However, in passing the Act, Congress did not simply rely on this presumption; rather, it affirmatively stated, in clear and express language, its intent to preserve state common law remedies. Given such unambiguous statements of Congressional intent not to preempt, Petitioner faces a heavy burden in seeking to argue that Congress *implicitly* intended preemption. Indeed, in light of the prerequisites for "implied preemption" clearly established by this Court, it is a burden which Petitioner utterly fails to carry.

A. It Is To Be Presumed That The FWPCA Does Not Preempt Vermont Common Law.

As this Court has consistently recognized, there is a presumption that when Congress acts it does not preempt state law, unless there is a clear and unmistakeable Congressional intention to do so. This is especially true when legislation falls in those areas traditionally within the ambit of the state's police powers. As this Court stated recently in *Hillsborough County, Fla. v. Automated Medical Laboratories, Inc., supra:*

> Where . . . the field that Congress is said to have preempted has been traditionally occupied by the States we start with the assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress.

105 S.Ct. at 2376 (quoting *Jones v. Rath Packing Co., supra,* 430 U.S. at 525, and *Rice v. Santa Fe Elevator Corp., supra,* 331 U.S. at 230).[15]

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[15] *See also Silkwood v. Kerr-McGee Corp.,* 464 U.S. 238, 248, 255 (1984) (preemption analysis starts with presumption

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Since the provision of state common law remedies to redress injuries caused by pollution-generating activities clearly falls within the exercise of a state's police power, *Huron Portland Cement Co. v. Detroit, supra,* 362 U.S. at 442, this Court has stated that any inquiry into whether the FWPCA preempts state common law must then begin with precisely the same assumption. *Milwaukee II,* 451 U.S. at 316. Thus, absent a clear and unmistakable manifestation of Congressional intent to preempt state common law remedies through the passage of the FWPCA, the continuing vitality of Vermont common law is presumed.[16]

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that Congress did not intend to displace state law, and dictates no preemption of state punitive damages remedies by federal regulation of nuclear facilities, absent express Congressional intention to do so); *Askew v. American Waterways Operators, Inc.,* 411 U.S. 325, 343 (1973) ("It follows, a *fortiori,* that sea-to-shore pollution—historically within the reach of the police power of the States—is not silently taken away from the States by the Admiraity Extension Act, which does not purport to supply the exclusive remedy."); *Ferebee v. Chevron Chemical Co., supra,* 736 F.2d at 1542 (Federal Insecticide, Fungicide, and Rodenticide Act did not preempt state tort suits based on inadequacy of an EPA-approved label); *Chevron U.S.A., Inc. v. Hammond, supra,* 726 F.2d at 488 (Ports and Waterways Safety Act did not preempt police power of Alaska to pass regulations regarding pollution discharges into State's boundary waters).

[16]*See generally Stoddard v. Western Carolina Sewer Auth., supra,* 784 F.2d at 1207 (FWPCA does not preempt common law nuisance action by private citizens, absent "a clear and manifest congressional purpose" to do so); *Bass River Assocs v. Mayor of Bass River Township, supra,* 743 F.2d at 162 (local zoning

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B. The FWPCA Expressly Preserves State Common Law Remedies For Suits Between Private Parties.

Congress, in passing the FWPCA, did not simply rely on the presumption that the Act would not displace state law. Instead, it clearly and affirmatively expressed its intent to preserve state common law remedies to redress private injuries from water pollution. Section 505(e) of the Act, the so-called "savings clause," expressly provides:

> Nothing in this section shall restrict any right which any person (or class of persons) may have under any statute or common law to seek enforcement of any effluent standard or limitation *or to seek any other relief* (including relief against the Administrator or a State agency).

33 U.S.C. § 1365(e) (emphasis added). Nothing could be a clearer indication of legislative intent to preserve state common law rights.

Indeed, several courts which have considered the question have declared that Congress, in passing the Act, clearly intended to preserve all state common law remedies. *Stoddard v. Western Carolina Sewer Authority, supra,* 784 F.2d at 1207 ("We cannot imagine a clearer Legislative expression retaining the right to [state law] remedies [than that

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regulations regarding houseboats not preempted by federal legislation for ship licensing or FWPCA); Glicksman, *supra,* 134 U.Penn.L.Rev. at 183 ("Absent a clear manifestation of congressional intent to preempt state common-law remedies, the presumption of continuing state authority cannot be rebutted."); A. Cohen, *Statutory Preemption of Federal Common Law: Milwaukee v. Illinois,* 24 J.Urb&Contempt.L. 245, 256-58 (1983); Dexter, *supra,* 1982 Wis.L.Rev. at 655-56, 663-64, and n.276.

expressed in 33 U.S.C. § 1365(e)]."); *Committee for Consideration of Jones Falls Sewage System v. Train, supra,* 539 F.2d at 1009 n.9 (Congress "recognized the continuing vitality of state common law nuisance actions" in subsection 1365(e) of the FWPCA) (cited in *Milwaukee II,* 451 U.S. at 329); *City of Philadelphia v. Stepan Chemical Co.,* 544 F.Supp. 1135, 1154 (E D.Pa. 1982) (finding no preemption under FWPCA and allowing action for damages relating to water pollution on state common law nuisance, trespass, strict liability and negligence grounds). *Cf. Middlesex County Sewerage Auth. v. Sea Clammers, supra,* 453 U.S. at 20 n.31 ("The legislative history [of the FWPCA savings clause] makes clear Congress' intent to allow further enforcement of antipollution standards arising under *other* statutes *or state common law.")* (emphasis added).

Such preservation is wholly consonant with the legislative history of the FWPCA, which provides even more persuasive evidence that Congress intended the savings clause to preserve rights already enjoyed by citizens. The Senate Report accompanying 33 U.S.C. § 1365(e) states:

> It should be noted, however, that the section would specifically preserve any rights or remedies under any other law. *Thus, if damages could be shown, other remedies would remain available. Compliance with requirements under this Act would not be a defense to a common law action for pollution damages.*

S.Rep. No. 92-414, 92d Cong., 2d Sess. 81, *reprinted in* 1972 *U.S. Code Cong. & Ad. News* 3668, 3746-47 (emphasis added) (A 12-13). A review of the 1971 Senate markup hearings on the FWPCA confirms Congressional intent to preserve all private, common law remedies:

> "The provision, subsection e, provides merely that . . . this section [§ 1365(e)], the authorization granted in this section, in no way affects any rights a person has, whether or not acting alone or as a class, under any other law, statutory or common, for relief against a pollutor (sic). This would normally mean that if there are some damages, standard common law damages, and a person would like to join with a class of people that suffered similar damage, this does not prevent them from doing so."

Transcripts, Senate Committee on Public Works' markup of FWPCA, Roll 17 at 1617-18 (9/21/71) (JA 189). *See also* Remarks of Senator Stafford, Cong.Rec. S11305-07 (daily ed. Sept. 12, 1985) (JA 184-91).[17]

Moreover, the preservation of common law remedies is consistent with the Act's underlying purpose, which is to "eliminate the discharge of pollutants into navigable waters by 1985." *Ouellette,* 602 F.Supp. at 268 (*citing* 33 U.S.C. § 1251(a)(1)) (A 11). To this end, and despite "extensive federal oversight," the "express policy" of Congress is "to recognize, preserve, and protect the primary responsibilities and rights of States to prevent, reduce, and eliminate pollution . . . ." *Id.* (*quoting* 33 U.S.C. § 1251(b)). Thus, subsection 1370(2) expressly instructs that the Act shall not "be construed as impairing or in any manner affecting any right or jurisdiction of the States

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[17]Recent Senate debate on a proposed amendment to the savings clause confirms that body's assumption that private citizens have always retained their right to sue polluters, under state common law, for the injuries caused by such pollution. *See* S. 1128, 99th Cong., 1st Sess., 131 Cong. Rec. S8126-40 (daily ed. June 13, 1985). That amendment would add a new subsection (e)(3) to the citizen suit provision, extending to states the same rights enjoyed by private citizens to "seek any other relief" in federal courts exercising diversity jurisdiction and enforcing state common law. Glicksman, *supra,* 134 U.Penn.L.Rev. at 209 n.463.

with respect to the waters (*including boundary waters*) of such states." *Id.* (emphasis added).

Finally, the regulations promulgated by the EPA to administer the NPDES permit process also presume that common law remedies for pollution-caused injuries survive the regulatory scheme:

> The issuance of a permit does not authorize any injury to persons or property or invasion of other private rights, or any infringement of State or local law or regulations.

40 C.F.R. § 122.5(c) (rev'd 7/1/85) (App. 4). *See Hillsborough County, Fla. v. Automated Medical Laboratories, Inc., supra,* 105 S.Ct. at 2377 (given detailed manner in which federal agencies normally address regulated activity, "we can expect that they will make their intentions clear if they intend for their regulations to be exclusive").

It is therefore amply clear that Congress did not expressly preempt state common law remedies for those injured by interstate water pollution. To the contrary, the manifest and oft-expressed legislative intent was precisely to preserve all such state remedies. *Cf., Wardair Canada, Inc. v. Florida Dept. of Revenue,* 54 U.S.L.W. 4687, 4688-89 (U.S. June 17, 1986), *aff'g.* 455 So.2d 326 (Fla. 1984) (where Federal Aviation Act expressly permits state's imposition of sales tax on airline fuel, no preemption of state law). As Chief Judge Coffrin concluded in his opinion below:

> Consideration of the express language of the saving clause and state authority provision of the Act, the legislative history, and the stated objectives of the Act inevitably leads one to the conclusion that Con-

> gress intended to authorize resort to state nuisance law in situations such as the instant one.

Ouellette, 602 F. Supp. at 272 (A 19-20).

C. Nothing In The FWPCA Impliedly Preempts State Common Law Remedies.

Given the presumption against federal preemption of state common law, the absence of express preemptive language in the FWPCA, and, indeed, the presence of language expressly preserving state common law remedies, Petitioner faces an "uphill battle" in arguing that such remedies were impliedly preempted by the Act. *Hillsborough County, Fla. v. Automated Medical Laboratories, Inc., supra,* 105 S.Ct. at 2375. Given the prerequisites set forth by this Court for implied preemption, it is a battle which Petitioner utterly fails to win.

This Court recently reiterated the two-part test for establishing that state common law has been impliedly preempted by a federal statute. In order to satisfy the Supremacy Clause, the proponent of implied preemption must establish either that Congress has totally occupied the field of a given legislation, or that the federal act impossibly conflicts with state law:

> [First, in] the absence of express pre-emptive language, Congress' intent to pre-empt all state law in a particular area may be inferred where the scheme of federal regulation is sufficiently comprehensive to make reasonable the inference that Congress "left no room" for supplementary state regulation. Pre-emption of a whole field also will be inferred where the field is one in which "the federal interest is so dominant that the federal system will be assumed to preclude enforcement of state laws on the same subject."

> [Second, even] where Congress has not completely displaced state regulation in a specific area, state law is nullified to the extent that it actually conflicts with federal law. Such a conflict arises when "compliance with both federal and state regulations is a physical impossibility," or when state law "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress."

Id. at 2375 (citations omitted). In *Hillsborough* this Court went on to stress the significant burden borne by the party arguing implied preemption, in terms which are equally applicable here:

> Appellee must thus present a showing of implicit pre-emption of the whole field, or of a conflict between a particular local provision and the federal scheme, that is strong enough to overcome the presumption that state and local regulation of health and safety matters can constitutionally coexist with federal regulation.

Id. at 2376. Here, as in *Hillsborough,* that burden is insurmountable.

1. The FWPCA is Neither So Comprehensive, Nor the Federal Interest so Dominant, as to Impliedly Preempt State Law.

Petitioner cannot successfully argue that the FWPCA is so comprehensive as to "leave no room" for supplementary state law remedies, or that the federal interest in redressing private pollution-cause injuries is so dominant as to preempt such relief. As this Court pointed out in *Milwaukee II,* the comprehensiveness of a federal scheme is far less important when analyzing whether state, rather than federal, common law has been preempted:

> Since federal courts create federal common law only as a necessary expedient when problems requiring federal answers are not addressed by federal statutory law, the comprehensive character of a federal statute is quite relevant to the present question, while it would not be were the question whether state law, which of course does not depend on the absence of an applicable Act of Congress, still applied.

Id. at 319 n.14 (citations omitted). *See also Silkwood v. Kerr-McGee Corp., supra,* 464 U.S. at 256.

In *Hillsborough,* the petitioner unsuccessfully attempted to rebut the strong presumption against preemption by arguing the "comprehensiveness" of the federal scheme.[18] *Id.* at 2377. This Court rejected that argument by noting that the "subjects of modern social and regulatory legislation often by their very nature require intricate and complex responses by Congress, but without Congress necessarily intending its enactment as the exclusive means of meeting the problem." *Id.* (quoting *New York Department of Social Services v. Dublino,* 413 U.S. 405, 415 (1973)). Thus, "merely because the federal provisions were sufficiently comprehensive to meet the need identified by Congress did not mean that States and localities were barred from identifying additional needs or imposing further requirements in the field." *Id.* The Court went on:

> To infer pre-emption whenever any agency deals with a problem comprehensively is virtually tanta-

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[18] Although in *Hillsborough* the Court was limited to the question of whether the federal *regulatory* scheme preempted state and local *regulation,* this Court pointed out that the same analysis would apply to the instant issue—whether federal *statutes* preempt state *common* law. *Hillsborough County, Fla. v. Automated Medical Laboratories, Inc., supra,* 105 S.Ct. at 2375.

> mount to saying that whenever a federal agency decides to step into a field, its regulations will be exclusive. Such a rule, of course, would be inconsistent with the federal-state balance embodied in our Supremacy Clause jurisprudence.

Id. at 2377 (citing *Jones v. Rath Packing Co., supra,* 430 U.S. at 525).[19]

In the instant case, the FWPCA is not so comprehensive as to imply preemption of state common law remedies.[20] The statute simply sets forth a regulatory mechanism for limiting certain pollution discharges into interstate waters, and for monitoring compliance with those limitations. Nowhere in the FWPCA is provision made for remedying inevitable pollution-caused private injuries. *Ouellette,* 602 F.Supp. at 269 (citing *Middlesex County Sewerage Authority v. National Sea Clammers Ass'n, supra,* 453 U.S. at 13-18) (A 12). *See also Silkwood v. Kerr-McGee Corp., supra,* 464 U.S. at 251 (Given Congress' failure to provide any federal remedy for persons injured by radiation injuries, it "is difficult to believe that Con-

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[19]This Court also reasoned that since Congress and federal agencies "normally address problems in a detailed manner and can speak through a variety of means, . . . we can expect that they will make their intentions clear if they intend" for their statutes and regulations to be "exclusive." *Id.* at 2377. For that reason, this Court "will seldom infer, solely from the comprehensiveness of federal [statutes or] regulations, an intent to preempt in its entirety a field related to health and safety." *Id.*

[20]Notwithstanding statements by this Court characterizing the FWPCA as "an all encompassing program of water pollution regulation," whose major purpose was to "establish a *comprehensive* long range policy for the elimination of water pollution," *Milwaukee II,* 451 U.S. at 318 (emphasis in original), its "gaps and shortcomings" in the interstate context, especially where private interests are injured, have been noted repeatedly. *See e.g.,* Glicksman, *supra,* 134 U.Penn.L.Rev. at 198-200, and nn. 411-415.

gress would, without comment, remove all means of judicial recourse."). Thus, in the absence of state common law remedies, a person injured by interstate water pollution would be unable to recover against the polluter. As Chief Judge Coffrin noted, it is inconceivable that such a result, clearly antithetical to the ends of the Act, was intended by Congress. *Ouellette,* 602 F.Supp. at 269 (A 12).

Nor can Petitioner successfully argue that the federal interest in the matter predominates, inasmuch as remedying injuries to citizens caused by the pollution-generating actions of others falls squarely within the police powers of the states. *Milwaukee II,* 451 U.S. at 316 (*quoting Jones v. Rath Packing Co., supra,* 430 U.S. at 525, and *Rice v. Santa Fe Elevator Corp., supra,* 331 U.S. at 230).[21] In *Hillsborough,* this Court similarly refused to infer preemption from the alleged dominance of the federal interest in the matter of blood plasma donorship. "Rather, as we have stated, the regulation of health and safety is primarily, and historically, a matter of local concern." *Hillsborough County, Fla. v. Automated Medical Laboratories, Inc., supra,* 105 S.Ct. at 2378.

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[21]Recently, the Fourth Circuit Court of Appeals followed this analysis and held that the FWPCA did not preempt state law remedies. *See Stoddard v. Western Carolina Regional Sewer Authority, supra,* 784 F.2d at 1207, in which riparian landowners sued a municipal sewer authority for intrastate water pollution, seeking enforcement of the FWPCA and asserting state common law nuisance and taking claims, as well. The Circuit Court stated:

> Before the Supreme Court finds that state law has been preempted . . . a clear and manifest congressional purpose must be found, and the Court's analysis includes due regard for the concepts of federalism. We see nothing in the Clean Water Act that presages a congressional intent to

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Thus, Petitioner cannot meet the first prong of the test for implied preemption of Vermont common law remedies: the FWPCA is not so comprehensive, nor the federal interest so dominant, as to occupy the field. Congress has indeed left room for supplementary state relief, since state common law provides the only remedy to private parties injured by interstate water pollution. Moreover, given the historic interest of the states in providing precisely the relief withheld in the Act, it cannot be said that the federal interest in the matter so predominates as to imply preemption of state law.

2. State Law Remedies Do Not Conflict With The Act Such As To Imply Preemption.

Equally meritless is the argument that the FWPCA so conflicts with the provision of state common law remedies as to imply their preemption. In *Silkwood v. Kerr-McGee Corp., supra,* this Court pointed out that, in order to imply preemption of state law on this ground, the inquiry turns on "whether there is an *irreconcilable* conflict between the federal and state standards or whether the imposition of a state standard in a damages action would frustrate the objectives of the federal law." *Id.* at 256 (emphasis added).

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> occupy the entire field of water pollution to the exclusion of State regulation.

Id. (citations omitted), *Accord, Bass River Assocs v. Mayor of Bass River, supra,* 743 F.2d at 165-66 (Section 1370 "[c]learly shows Congress' intent *not* to preempt state antipollution efforts. . . . Thus we find . . . no merit in the . . . contention that 'Congress has left no room for state supplementation.'") (holding FWPCA does not preempt local ordinance prohibiting "floating homes").

In *Silkwood,* this Court found "no such conflict or frustration" between the Federal Atomic Energy Act and the provision of state common law remedies. *Id.* Pointing out that the possibility of "[p]aying both federal fines and state-imposed punitive damages for the same incident would not appear to be physically impossible," *id.* at 257, this Court also made clear that exposure to punitive damages does not "frustrate any purpose of the federal remedial scheme." *Id.*

Indeed, since the federal goals of uniformity and promotion of nuclear power may not be accomplished at the cost of public health and safety, this Court concluded that subjecting regulated industries to state common law liability for the injuries they cause in fact *promotes* the federal goals. *Id. See also Hillsborough County, Fla. v. Automated Medical Laboratories, Inc., supra,* 105 S.Ct. at 2378-80 (Different and stricter state and local requirements neither conflict with federal scheme nor "imperil" the federal goal of insuring an "adequate supply of plasma."). The same analysis, applied to the instant case, yields only one conclusion: permitting private parties injured by interstate water pollution to seek redress under state common law will neither conflict with the federal scheme nor frustrate the objectives of the FWPCA.

Clearly, it is not "physically impossible" for Petitioner —or any other entity operating pursuant to an NPDES permit—to comply with both the federal scheme and any civil judgment rendered against it. *Id.* at 257. As one commentator has noted:

> The application of state B's common-law remedies to a state A polluter would not actually conflict with federal law in the sense that it would be physically impossible to comply with both sets of standards. By com-

> plying with the most stringent requirement—either federal or state—company A also complies with the more lenient controls. . . . If state B's courts assess damages against company A, even though the company is in full compliance with federal standards, the company can comply with both federal and state B's laws by limiting discharges in accordance with the federal standards and compensating, in accordance with the state B court decree, those injured by the discharges.

Glicksman, *supra,* 134 U.Penn. L.Rev. at 198 and n.407.

Nor does the provision of state common law relief stand as an "obstacle to the accomplishment and execution of the full purposes of objectives of Congress." *Hillsborough County, Fla. v. Automated Medical Laboratories, Inc., supra,* 105 S.Ct. at 2375. First, nothing in the Act implies that Congress intended an NPDES permit to limit the legal obligations imposed upon a discharger. Indeed, as Chief Judge Coffrin noted:

> [T]here is no indication that Congress ever intended that the NPDES permit confer an absolute right to discharge to the extent allowed by the permit. Since compliance with the Act does not constitute a defense to a common law action for damages, Congress must have recognized that some uncertainty would result to discharges of pollutants. The goal of the FWPCA is not finality; rather, it is the elimination of the discharge of pollutants.

Ouellette, 602 F.Supp. at 271 (A 17-18) (citations omitted). *See also* 40 C.F.R. § 122.5(c) (App. 4).

Moreover, this federal goal is actually promoted by allowing such private nuisance actions to proceed. As Chief Judge Coffrin observed:

> [N]othing in the application of traditional common law remedies for nuisance would, as a practical matter, interfere with the objectives of the Act. In fact, the opposite is true. Congress, in passing the Act sought "to restore and maintain the natural chemical, physical, and biological integrity of the Nation's waters" by eliminating the discharge of pollutants into navigable waters. S.Rep. 92-414, 92nd Cong., 2d Sess. 81, *reprinted in U.S. Code Cong. & Ad.News* 3668, 3678. To this end, states' imposition of compensatory damage awards and other equitable relief for injuries caused by discharges into interstate waters merely *supplement* the standards and limitations imposed by the Act.

Ouellette, 602 F.Supp. at 271 (A 17) (emphasis in original). Thus, the continued availability of traditional state common law remedies would not conflict with the FWPCA, and preemption on this basis cannot properly be implied.

In short, Congress neither expressly nor impliedly preempted state common law remedies to redress injuries caused to private citizens by another's pollution-generating activities. Indeed, the language preserving such remedies is clearly set forth in the statute itself, and in its legislative history. Moreover, the FWPCA is not so comprehensive as to imply preemption, nor can preemption be implied from any arguable dominance of federal interest in the matter, given the historic right of citizens to seek redress, in their own courts, for injuries caused by the pollution-related activities of others. Finally, since compliance with both state and federal law is not only possible, but furthers the goals of the Act, preemption cannot be implied from supposed conflicts with the federal scheme.

III. VERMONT LAW APPLIES TO THE ENTIRE CONTROVERSY.

It is clear that federal law has not preempted state common law remedies for injuries caused by pollution in interstate waters. The United States agrees with this posi-

tion, insofar as Respondents seek compensatory damages for injuries to their persons and properties. U.S.Br. 22-26. However, the United States goes on to argue that the FWPCA preempts Respondents' common law claims for injunctive relief and punitive damages, in that these claims must be adjudicated under New York law, the state from which Petitioner's pollution eminates. U.S.Br. 17-22, 26-28. This argument, which selects out portions of the common law for the purposes of preemption analysis, was soundly rejected by this Court in *Silkwood v. Kerr-McGee Corp., supra,* and is equally unavailing here.

In *Silkwood,* this Court began by employing its traditional preemption analysis to determine that the Atomic Energy Act did not preempt state tort law remedies, both because Congress intended their preservation, *id.,* 464 U.S. at 251-54, and because allowing resort to state law would not conflict with the federal scheme. *Id.* at 257. This Court then rejected Kerr-McGee's further argument that, given the differences between compensatory and punitive damage awards, at most Congress preserved only the former:

> This argument, however, is misdirected because our inquiry is not whether Congress expressly allowed punitive damages awards. Punitive damages have long been a part of traditional state tort law. As we noted above, Congress assumed that traditional principles of state tort law would apply with full force unless they were expressly supplanted. Thus, it is Kerr-McGee's burden to show that Congress intended to preclude such awards. Yet, the company is unable to point to anything in the legislative history or in the regulations that indicates that punitive damages were not to be allowed.

Id. at 255 (citations omitted).

The Court also rejected the arguments of the United States, as *amicus curiae,* that the award of punitive damages was preempted because it conflicted with the permit/penalties provisions of the Act:

> [T]he award of punitive damages in the present case does not conflict with that scheme [of imposing civil penalties on licensees who violate federal standards]. Paying both federal fines and state-imposed punitive damages for the same incident would not appear to be physically impossible. Nor does exposure to punitive damages frustrate any purpose of the federal remedial scheme. . . . We also reject Kerr-McGee's submission that the punitive damages award . . . conflicts with Congress' express intent to preclude dual regulation of radiation hazards.

Id. at 257 (citations omitted). Similarly, here there is simply no evidence of legislative intent to preempt or limit any aspect of state common law relief.

As has already been demonstrated, the "entire discussion" surrounding the 1972 Amendments was "premised on the assumption" that state common law remedies would continue to be available, notwithstanding the regulatory scheme. *Id.* at 254. Thus, here, as in *Silkwood,* Respondents' right to seek relief under Vermont law cannot be withdrawn in the piecemeal fashion urged by the United States. Compensatory damages compensate for injuries; punitive damages and injunctive relief, "long . . . traditional part[s] of state tort law," *Silkwood v. Kerr-McGee Corp., supra,* 464 U.S. at 255, require no different analysis. Such remedies are "designed primarily to redress a plaintiff's particular injury. . . . A state's nuisance law develops not to regulate the activity of neighboring states but to protect the health, welfare, and property rights of its own residents." *Ouellette,* 602 F.Supp. at 271-72 (A 19).

Thus, if state common law is preserved, and it clearly is under the preemption analysis dictated by this Court,

then normal choice-of-law doctrines mandate the application of Vermont law to the entire controversy.[22]

IV. RESPONDENTS ARE NOT PREEMPTED FROM LITIGATING THIS COMMON LAW ACTION IN VERMONT COURTS (INCLUDING A FEDERAL DISTRICT COURT) UNDER VERMONT LAW.

It is also clear that Respondents may litigate this action in the courts of Vermont, including a federal district court sitting in Vermont. Petitioner, however, argues that only the courts of New York may hear the matter, applying New York law (A 7). Petitioner in effect is asking this Court to develop a wholly new common law rule of subject matter jurisdiction. Petitioner urges that no courts, except the courts of the state where industrial pollution originates, have jurisdiction to hear pollution damage actions. This position is simply without merit.

Petitioner first attempts to argue that the FWPCA itself dictates such a rule. However, as the United States points out, U.S.Br. 16, this argument, which erroneously "equates legislative jurisdiction with judicial jurisdiction" by relying upon the citizen suit provision of the Act, is inapposite to the private action brought here. *Id.* Secondly,

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[22]Indeed, even under the arguments of the United States, Vermont law would apply here. U.S.Br. 20 and n.27 (arguing that Vermont law would apply if New York law so dictates) (citing previous arguments by Petitioner that New York law calls for the application of Vermont law, U.S.Br. 7-8, and n.7, and *Cousins v. Instrument Flyers, Inc.*, 44 N.Y.2d 698, 699, 376 N.E. 2d 914, 915 (1978) ("*Lex loci delicti* remains the general rule in tort cases to be displaced only in extraordinary circumstances.")). *See also* Argument, *supra*, at 12.

Petitioner seeks to rely on *dicta* in *Milwaukee III*. Pet. 20.[23] However, as has already been noted, there the Seventh Circuit was constrained by the sovereign nature of the parties, since each state was precluded from utilizing its own state law to enforce rights against the other state. Respondents have already established that such constraints do not exist in this action between private parties. *See* Argument I, *supra*.

The only other basis offered by Petitioner to disqualify a federal court sitting in Vermont is the one stated in its petition: bias and local prejudice on the part of such federal courts. Pet. 6. These allegations, which insult and misapprehend the role of the federal judiciary, hardly merit full attention in this brief. Clearly, whichever state law is to be applied in this matter, courts in Vermont are qualified to apply it. Indeed, as the United States has indicated, the threat of possible bias would exist to the same extent in New York courts, U.S.Br. 17 n.21, and is precisely why federal diversity jurisdiction historically exists in a case such as this. *See* 3 J.Elliot, *Debates on the Federal Constitution* 533 (1836) (remarks of James Madison). Thus, this argument, which the United States aptly characterizes as "wholly insubstantial," U.S.Br. 16, must be rejected.

All of the sound reasons which compel the conclusion that Respondents' common law remedies have not been preempted also compel the determination that this action may proceed in Vermont federal court, applying Vermont

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[23]"Pet." citations are to the Petition for Certiorari, filed with this Court on January 22, 1986.

law. As such, this Court should affirm the decisions of the courts below.

CONCLUSION

For all the foregoing reasons, the judgment of the Court of Appeals should be affirmed.

Dated: Middlebury, Vermont
July 14, 1986

Respectfully submitted,

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SUPPLEMENTAL APPENDIX

TEXT OF STATUTES RELIED ON FEDERAL WATER POLLUTION CONTROL ACT

33 U.S.C. § 1251

§ 1251. *Congressional Declaration of Goals and Policy*

(a) *Restoration and maintenance of chemical, physical and biological integrity of Nation's waters; national goals for achievement of objective*

The objective of this chapter is to restore and maintain the chemical, physical, and biological integrity of the Nation's waters. In order to achieve this objective it is hereby declared that, consistent with the provisions of this chapter—

(1) it is the national goal that the discharge of pollutants into the navigable waters be eliminated by 1985;

(2) it is the national goal that wherever attainable, an interim goal of water quality which provides for the protection and propagation of fish, shellfish, and wildlife and provides for recreation in and on the water be achieved by July 1, 1983;

(3) it is the national policy that the discharge of toxic pollutants in toxic amounts be prohibited;

(4) it is the national policy that Federal financial assistance be provided to construct publicly owned waste treatment works;

(5) it is the national policy that areawide waste treatment management planning processes be developed and implemented to assure adequate control of sources of pollutants in each State; and

(6) it is the national policy that a major research and demonstration effort be made to develop technology necessary to eliminate the discharge of pollutants into the navigable waters, waters of the contiguous zone, and the oceans.

(b) *Congressional recognition, preservation, and protection of primary responsibilities and rights of States*

It is the policy of the Congress to recognize, preserve, and protect the primary responsibilities and rights of States to prevent, reduce, and eliminate pollution, to plan the development and use (including resoration, preservation, and enhancement) of land and water resources, and to consult with the Administrator in the exercise of his authority under this chapter. It is the policy of Congress that the States manage the construction grant program under this chapter and implement the permit programs under sections 1342 and 1344 of this title. It is further the policy of the Congress to support and aid research relating to the prevention, reduction, and elimination of pollution, and to provide Federal technical services and financial aid to State and interstate agencies and municipalities in connection with the prevention, reduction, and elimination of pollution.

(c) *Congressional policy toward Presidential activities with foreign countries*

It is further the policy of Congress that the President, acting through the Secretary of State and such national and international organizations as he determines appropriate, shall take such action as may be necessary to insure that to the fullest extent possible all foreign countries shall take meaningful action for the prevention, reduction, and elimination of pollution in their waters and in international waters and for the achievement of goals regarding the elimination of discharge of pollutants and the improvement of water quality to at least the same extent as the United States does under its laws.

(d) *Administrator of Environmental Protection Agency to administer chapter*

Except as otherwise expressly provided in this chapter, the Administrator of the Environmental Protection Agency (hereinafter in this chapter called "Administrator") shall administer this chapter.

(e) *Public participation in development, revision, and enforcement of any regulation, etc.*

Public participation in the development, revision, and enforcement of any regulation, standard, effluent limitation, plan, or program established by the Administrator or any State under this chapter shall be provided for, encouraged, and assisted by the Administrator and the States. The Administrator, in cooperation with the States, shall develop and publish regulations specifying minimum guidelines for public participation in such processes.

(f) *Procedures utilized for implementing chapter*

It is the national policy that to the maximum extent possible the procedures utilized for implementing this chapter shall encourage the drastic minimization of paperwork and interagency decision procedures, and the best use of available manpower and funds, so as to prevent needless duplication and unnecessary delays at all levels of government.

(g) *Authority of States over water*

It is the policy of Congress that the authority of each State to allocate quantities of water within its jurisdiction shall not be superseded, abrogated or otherwise impaired by this chapter. It is the further policy of Congress that

nothing in this chapter shall be construed to supersede or abrogate rights to quantities of water which have been established by any State. Federal agencies shall co-operate with State and local agencies to develop comprehensive solutions to prevent, reduce and eliminate pollution in concert with programs for managing water resources.

TEXT OF REGULATIONS RELIED ON
PART 122 — EPA ADMINISTERED PERMIT PROGRAMS: THE NATIONAL POLLUTANT DISCHARGE ELIMINATION SYSTEM

40 C.F.R. § 122.5

§ 122.5. *Effect of a Permit*

(a) *Applicable to State programs, see § 123.25.* Except for any toxic effluent standards and prohibitions imposed under section 307 of the CWA, compliance with a permit during its term constitutes compliance, for purposes of enforcement, with sections 301, 302, 306, 307, 318, 403, and 405 of CWA. However, a permit may be modified, revoked and reissued, or terminated during its term for cause as set forth in §§ 122.62 and 122.64.

(b) *Applicable to State programs, see § 123.25.* The issuance of a permit does not convey any property rights of any sort, or any exclusive privilege.

(c) The issuance of a permit does not authorize any injury to persons or property or invasion of other private rights, or any infringement of State or local law or regulations.

REPLY

BRIEF

No. 85-1233

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

INTERNATIONAL PAPER COMPANY,

Petitioner,

v.

HARMEL OUELLETTE and LILA OUELLETTE, CLIFTON BROWNE and EDLA BROWNE, ALDEE PLOUFFE and SHIRLEY PLOUFFE, individually, on behalf of themselves, and on behalf of all similarly situated plaintiffs, H. VAUGHN GRIFFIN, SR., ARDATH GRIFFIN, ALAN THORNDIKE and ELLEN THORNDIKE, WESLEY C. LARRABEE and VIRGINIA LARRABEE, F. ALFRED PATTERSON, JR., and LOIS T. PATTERSON,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

REPLY BRIEF OF PETITIONER

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Statutes and Regulations

Miscellaneous Material

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Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

REPLY BRIEF OF PETITIONER

Petitioner International Paper Company ("IPCo") respectfully submits this reply brief in response to the answering brief of the respondent riparian land owners and to the briefs *amicus curiae* filed on behalf of the United States by the Solicitor General and on behalf of thirteen individual states by the Attorney General of Tennessee.

Summary of Argument

The core issue which this case presents is whether, and if so, to what extent, non-source states may apply their laws to discharges into interstate waters from another state and the jurisdiction of the courts of non-source states to entertain suits respecting such discharges in view of the Federal Water Pollution Control Act of 1972 ("FWPCA"), 33 U.S.C. §§ 1251 *et seq.* (1972) (A28-49).*

The Respondents and the states *amici* find in the FWPCA no impairment of what they see as an exercise of traditional power of non-source states to give relief against a nuisance, regardless of its source.** Indeed, Respondents (and the Second Circuit) discern an intent of Congress to revive non-source state competence over such discharges and to overturn the holding of *Illinois* v. *Milwaukee,* 406 U.S. 91 (1972) (*"Milwaukee I"*) that such jurisdiction is preempted. The Petitioner and the United States, on the other hand, find in the FWPCA a comprehensive exertion of federal regulatory jurisdiction over discharges into navigable waters which, under familiar preemption principles, imposes limitations upon the power of states to act with respect to that subject.

The disagreement between Petitioner and the United States, and it is a profound and wide one, is over the extent

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* "A" citations are to the Appendix to the Petition for a Writ of Certiorari.

** Respondents misleadingly refer to health and safety considerations in describing this law suit and identifying the purported state interests which they contend support Vermont's jurisdiction over Petitioner's activities. The water class certified by the Vermont District Court never asserted any health or safety claims but claimed only that IPCO's discharges constituted a nuisance that interfered with the enjoyment of their property. *Ouellette* v. *International Paper Company,* 86 F.R.D. 476, 478 (D. Vt. 1980).

to which non-source state power has been curtailed. Petitioner argues, with the Seventh Circuit, that Congress' decision, in enacting the FWPCA, to foster a partnership of federal and source state regulation of discharges, by necessary implication, precludes the exercise of non-source state power to regulate such discharges, by any means, including damage actions.* Petitioner argues further that in order to avoid conflicts in application and the threat of multiple regulation of a single source, it is necessary to infer as well a congressional intent to confine proceedings to exercise the source state's jurisdiction to courts sitting in the source state.

The United States, arguing that the FWPCA preempts only "regulatory" actions based on a non-source state's law, finds no preemption of non-source state jurisdiction to grant "compensatory" damages (but not punitive damages or injunctions) and supports the jurisdiction of federal and state courts sitting in non-source states to entertain actions under non-source state law as well as source state law, guided only by traditional choice of law principles. Indeed, it argues that if the source state, applying its choice-of-law principles, would apply the law of a non-source state, then the non-source state court may accord any regulatory as well as compensatory remedies that the non-source state's law would provide.

We deal structurally with the argument of the Respondents and comment on the related contentions of the *amici* interstitially.

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* The United States observes (Brief of United States as *Amicus Curiae,* pp. 7-9) that IPCo has in the past made statements not consistent with the position it urges in this case. To the extent that any general statements of Petitioner's then counsel, made outside the context of the issues now presented and in situations where these issues would not have been thoroughly explored by counsel, support this suggestion, they are disavowed.

ARGUMENT

I.

The FWPCA Is a Comprehensive Regulatory Scheme Intended to Exercise Federal Regulatory Jurisdiction Over Discharges Into Navigable Waters, Supplemented Only by More Stringent Source State Regulations.

Clearly, preemption analysis under the Supremacy Clause must begin with the system of regulation of liquid discharges into navigable waters which Congress intended when it enacted the FWPCA. Congress has ample power to oust completely any state authority, whether based on statute or common law, whether "regulatory" or purely compensatory. *See, e.g., Campbell* v. *Hussey*, 368 U.S. 297 (1961); *Pennsylvania* v. *Nelson*, 350 U.S. 497 (1956). While this Court has developed a number of principles of analysis which it employs for guidance in discerning the preemptive effect of a federal statute, it is the Act of Congress and the regulatory scheme the Act establishes which is supreme, and state authority in an area that has been federally regulated exists, if at all, only to the extent that the federal statutory scheme admits of its exercise.

The FWPCA is somewhat unusual in that it not only expressly establishes a scheme of federal regulation acting through federal instrumentalities, but also contemplates a system of federally-fostered source state regulation of discharges into navigable waters that is brigaded with, and can displace, federal regulation of point sources located within a source state and its boundary waters. This system of dual authority is limited to federal and source state regulation; non-source states are expressly assigned a consultative, rather than a regulatory role. So far as here relevant, the principle themes that characterize the statutory

scheme are: *first*, that any given source shall be subjected to a *single* regulatory regime, the source state's scheme if it meets federal requirements, the federal scheme if the source state does not; and *second*, that the jurisdiction of each source state is carefully qualified by subjecting its regulations to federal standards and a federal umpire, the Environmental Protection Agency Administrator.

The paradigm of preemption analysis is, of course, a federal statute which is claimed to supersede an inconsistent state power, whether statutory or common law, and the vast bulk of this Court's preemption decisions deal with this set of facts. Congress' exercise of its law-making power, however, offers a number of different reconciliations of federal and state power. For example, the Fair Labor Standards Act of 1938 ("FLSA"), 29 U.S.C. §§ 201 *et seq.*, and the Civil Rights Act of 1964, 42 U.S.C. §§ 2000-e *et seq.* establish a federal regulatory scheme, but authorize and foster more stringent state statutory regulations; the McCarren-Ferguson Act, 15 U.S.C. §§ 1011 *et seq.*, while broadly supportive of federal regulatory authority over the business of insurance, allows the states, by enacting consistent or inconsistent statutes, to supersede federal regulation in certain areas, notably trade regulation. This Court in *Silkwood* v. *Kerr-McGee*, 464 U.S. 238 (1983), found itself faced with two federal statutory policies, one which accorded exclusive regulatory control of nuclear plant safety to a federal agency and a second which preserved the competency of the states to provide tort remedies by way of compensation. In each case where this Court has been called upon to consider the effect of any of these federal statutes on state law, *see, e.g., Kirschbaum Co.* v. *Walling*, 316 U.S. 517 (1942) (construing FLSA); *F.T.C.* v. *National Cas. Co.*, 357 U.S. 560 (1958) (construing McCarren-Ferguson Act); *New*

York Gaslight Club, Inc. v. *Carey*, 447 U.S. 54 (1980) (construing Civil Rights Act), this Court saw its role as one of protecting the paramountcy of the entire federal statutory scheme, although the effect of that principle on the scope of state power varies considerably.

The scheme of the FWPCA, we submit, offers still another departure from the preemption paradigm—one in which there is a comprehensive scheme of regulation, an express deference, not to state power generally, but to source state regulation, and a clear intent not to have multiple regulation of a single source. § 402(c), 33 U.S.C. § 1342(c) (A45-46); *see EPA* v. *State Water Resources Control Board*, 426 U.S. 200, 206 (1976).

The analysis of the FWPCA's effect on state regulation of interstate water disputes adopted by the Respondents reveals a fundamental misconception of the FWPCA scheme. The Respondents chose to look at the specific components of this plan in isolation, ignoring the overall regulatory mechanism and ignoring the fact that Congress defined specific and differentiated roles for source states and non-source states. They argue, first, that there never was any preemption of state law jurisdiction over disputes over the use of interstate waters between private parties; that assuming *arguendo* that *Milwaukee I* holds that private, as well as quasi-sovereign actions were preempted, the FWPCA expressly supports the power of non-source states to entertain traditional actions to abate or compensate for a nuisance; and finally, that assuming *arguendo* that there was no express revival of such state competency, under traditional principles of preemption analysis, the FWPCA should not be construed as superseding non-source state jurisdiction. We deal with each of these arguments *seriatim*.

A. The Decisions of this Court in *Milwaukee I* and *Milwaukee II* were not limited to Disputes Between Quasi-Sovereign Entities.

As the Vermont District Court correctly concluded, after *Milwaukee I* and *Milwaukee* v. *Illinois*, 451 U.S. 304 (1981) ("*Milwaukee II*"), "state law . . . cannot control interstate water pollution controversies" absent Congressional authorization. *Ouellette* v. *International Paper Company*, 602 F. Supp. 264, 268 (D. Vt. 1985) (A17). Respondents attempt before this Court to argue that these decisions should be read in such a manner as to limit their effect to disputes between quasi-sovereigns seeking to regulate each other's water-polluting activities rather than to all disputes involving interstate waters. They read this Court's preemption analysis in *Milwaukee I* as nothing more than a necessary expedient to provide Illinois with a forum in which to bring a nuisance suit directed at the City of Milwaukee and other instrumentalities of Wisconsin. Brief of Respondents, pp. 15-16.*

Despite Respondents' claims, this Court's prior decisions make clear that federal law does not come into play only in interstate pollution disputes involving quasi-sovereign entities. Federal law governs interstate water disputes regardless of the nature of the parties; as this Court observed in *Milwaukee I*, "it is not only the character of the parties that requires us to apply federal law." 406 U.S. at 105 n.6.** There is nothing in either *Milwaukee I* or *Milwau-*

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* Respondents' argument on this score misrepresents both *Milwaukee I and Milwaukee II*. The holding of *Milwaukee I* is well illustrated by Justice Douglas' discussion of the body of federal common law which this Court expected would develop from that decision. 406 U.S. at 107-108.

** Notwithstanding Respondents' arguments, courts have generally recognized the right of private parties to sue under federal common

(footnote continued on following page)

kee II to suggest that federal law is only applicable to the regulation of the use of interstate waters where the litigants are sovereign entities rather than private parties.

Moreover, such a conclusion cannot be reconciled with the reasoning behind these decisions. To contend that *Milwaukee I* merely reflects an attempt to resolve a situation requiring "special treatment" and involving "extenuating circumstances" is to ignore completely the focus of that case on the peculiarly interstate nature of the controversy rather than on any particular aspect of the parties.* As the

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law. *See National Sea Clammers Ass'n* v. *City of New York*, 616 F.2d 1222 (3rd Cir. 1980), *vacated and remanded on other grounds sub nom. Middlesex County Sewerage Authority* v. *National Sea Clammers Ass'n*, 453 U.S. 1 (1981); *Byram River* v. *Village of Port Chester, New York*, 394 F. Supp. 618 (S.D.N.Y. 1975); *Clearfield Trust Co.* v. *United States*, 318 U.S. 363 (1943); *Hinderlider* v. *LaPlata River & Cherry Creek Ditch Co.*, 304 U.S. 92 (1938). The cases cited by Respondents (Brief of Respondents, p. 17) in support of their contention that the invocation of federal law is appropriate only where quasi-sovereign entities are involved further demonstrate their failure fully to consider the reasoning behind this Court's decision in *Milwaukee I*. Except for dicta in one case, *Township of Long Beach* v. *City of New York*, 445 F. Supp. 1203, 1213 (D.N.J. 1978), the denial of standing to private parties in the cases cited by Respondents was predicated primarily on the absence of any interstate effects of the pollution at issue. *See, e.g., Committee for Consideration of Jones Falls Sewerage System* v. *Train*, 539 F.2d 1006 (4th Cir. 1976); *Parsell* v. *Shell Oil Co.*, 421 F. Supp. 1275 (D. Conn. 1976), *aff'd without opinion*, 573 F.2d 1289 (2d Cir. 1977). These cases recognize that when the effects of water pollution are confined within the borders of the source state, the potential for interstate conflict and, hence, the need for the application of federal law, no longer exists. Where, as here, suits between private parties plainly implicate interstate concerns, the reasoning behind *Milwaukee I* is clearly applicable.

* Petitioner does not contest Respondents' assertion that courts in one state may adjudicate tort claims for injuries occurring in that state based on events occurring elsewhere. The exercise of such jurisdiction, however, is plainly limited to those situations in which

(footnote continued on following page)

United States observed in its *amicus* brief in *Illinois* v. *Milwaukee*, 731 F.2d 403 (7th Cir. 1984), *as amended*, Nos. 77-2246 & 81-2236 (May 29, 1984), *cert. denied sub nom., Scott* v. *City of Hammond*, 105 S. Ct. 979 (1985) ("*Milwaukee III*"),

> "This case is not an ordinary tort suit; it involves the question of pollution of interstate waters which this court repeatedly has held to require special treatment. There is not presented a choice-of-law question in the sense considered in *Klaxon Co.* v. *Stentor Electric Mfg. Co.*, 313 U.S. 487 (1941). Rather, it is clear that federal law governs (see *Milwaukee I*, 406 U.S. at 105 and n.7; *Hinderlider* v. *LaPlata River & Cherry Creek Ditch Co.*, 304 U.S. 92, 110 (1938)), and state law is preempted to the extent required by federal law." Brief for the United States at 13 n.12.

Milwaukee I plainly held that federal law applies in *all* interstate water disputes, and preempted state law-based regulation of discharges into interstate waters. Thus, prior to the passage of the FWPCA, state law was completely unavailable in interstate pollution disputes; following the enactment of the FWPCA, the use of state law was limited to those state remedies authorized, expressly or implicitly, by the FWPCA.*

(footnote continued from preceding page)

such a court has *both* subject matter and personal jurisdiction. In this instance, while a Vermont court may have *in personam* jurisdiction over IPCo, the unique nature of the underlying dispute curtails its jurisdiction over the subject matter of this action.

* While *Milwaukee II* distinguishes between the criteria used to determine whether a federal statute preempts state law and the less rigorous tests used to determine whether it supersedes federal common law, there is no suggestion in *Milwaukee II* that it intended to

(footnote continued on following page)

B. The FWPCA Did Not Confer on a Non-Source State the Power to Regulate Interstate Pollution Emanating From Another State.

Respondents' reliance on language in the FWPCA, in particular the "savings clause", § 505(c), 33 U.S.C. § 1365 (c) (A52), and similar references to preserving state law remedies in the legislative history, to support their contention that the FWPCA expressly preserves state common law remedies for suits between private parties, is plainly flawed. Instead, a fair reading of § 505(c) in the context of this Court's precedents requires the conclusion that Congress intended by the savings clause to ensure that § 505 was not read to extinguish any *existing* rights of the states, such as the right of a state to regulate dischargers within its own borders.

Nothing in the Act, the regulations or the legislative history does anything more than suggest that Congress intended "to save the right and jurisdiction of a state to regulate activity occurring within the confines of its boundary waters." *Milwaukee III*, 731 F.2d at 413. Certainly, there is nothing to support the respondents' claim that "the manifest and oft-expressed legislative intent" was precisely to preserve all state common law remedies for those injured by interstate water pollution, Brief of Respondents, p. 26,

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overrule the holding of *Milwaukee I* that federal law preempted state law regulation of discharges into interstate waters. The holding of *Milwaukee II* is that the comprehensive scheme of the 1972 FWPCA superseded federal common law. The *Milwaukee II* Court denied Illinois' petition for certiorari, which sought to review the Seventh Circuit's holding that state common law was preempted. *See Illinois* v. *Milwaukee*, 451 U.S. 982 (1981). Since *Milwaukee I* found federal preemption in the context of the original federal Clean Water Act, it seems at least unlikely that it would not have found general preemption in the far more comprehensive federal scheme that is set forth in the 1972 amendments.

including those state common law actions that had been held to be preempted by *Milwaukee I*. As this Court implied in *Milwaukee II*, the language of the savings clause cannot provide evidence of any intent by Congress to permit nuisance suits under the law of a non-source state:*

> The fact that the language of § 1365(e) is repeated *in haec verba* in the citizen-suit provisions of a vast arr..y of environmental legislation, see n.21 *supra*, indicates that *it does not reflect any considered judgment about what other remedies were previously available or continue to be available* under any particular statute." 451 U.S. at 329 n.22 (emphasis supplied).

Similarly without force is Respondents' claim that suggestions in the legislative history that Congress did not intend to foreclose existing private rights of action for damages constitute evidence that Congress intended to permit suits based on the law of a non-source state.** As

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* Moreover, this Court has consistently interpreted savings clauses, no matter how broadly written, to apply only when the state common law ostensibly "saved" was not in conflict with the regulatory scheme. *See, e.g., Chicago & N.W. Transp. Co.* v. *Kalo Brick & Tile Co.*, 450 U.S. 311, 328-29 (1981); *Texas and Pacific Ry.* v. *Abilene Cotton Oil Co.*, 204 U.S. 426, 446 (1907) ("This clause, however, cannot in reason be construed as continuing in shippers a common law right, the continued existence of which would be absolutely inconsistent with the provisions of the act. In other words, the act cannot be held to destroy itself.") As discussed *infra*, pp. 12-17, permitting suits based on the law of a non-source state would plainly conflict with the federal scheme embodied in the FWPCA.

** This Court and the inferior federal courts have construed the FWPCA as foreclosing damage actions under the federal maritime and admiralty jurisdictions, which has the effect of extinguishing any right of action, even one primarily compensatory, in those cases where such federal jurisdiction is exclusive. *See Middlesex County Sewerage Authority* v. *National Sea Clammers Ass'n*, 453 U.S. 1 (1981); *Conner* v. *Aerovox, Inc.*, 730 F.2d 835 (1st Cir. 1984), *cert. denied*, 105 S. Ct. 1747 (1985); *United States* v. *Oswego Barge Corp.*, 664 F.2d 327 (2d Cir. 1981).

enacted, the FWPCA leaves open the power of a source state to provide a private damage remedy as an aspect of the source state's regulatory scheme. *See* Brief of Petitioner, pp. 21-23. There is nothing to indicate that Congress' concern with providing some means of redress was intended as an expression of its desire to authorize suits for damages under the laws of a non-source state, a claim of jurisdiction over interstate waters which this Court had rejected in *Milwaukee I*.

C. The FWPCA Leaves No Room For the Exercise of Power by Non-Source States to Regulate Discharges.

As the Respondents suggest, preemption of all state regulation may be inferred "where the scheme of federal regulation is sufficiently comprehensive to make reasonable the inference that Congress 'left no room' for supplementary state regulations" or where "the field is one in which 'the federal interest is so dominant that the federal system will be assumed to preclude enforcement of state laws on the same subject,' " *Hillsborough County, Florida* v. *Automated Medical Laboratories, Inc.*, 105 S. Ct. 2371, 2375 (1985) (citations omitted), and state law may be nullified, to the extent that it conflicts with federal law, because compliance with both is a physical impossibility or "state law 'stands as an obstacle to the accomplishment and execution of the full purposes and objections of Congress.' " *Id.*, citing *Hines* v. *Davidowitz*, 312 U.S. 52 (1941).

While the fact that a Congressional regulatory scheme is "comprehensive" * does not compel the conclusion that there has been total preemption of state law, *id.* at 2377,

* Respondents correctly observe that this Court's characterization of the FWPCA as "comprehensive" in *Milwaukee II* was expressly stated to be confined to the issue whether the need for federal common law was obviated. 451 U.S. at 317-319.

citing *Jones* v. *Rath Packing Co.*, 430 U.S. 519, 525 (1977), it is clear that Congress may enact a federal regulatory scheme that neither permits nor contemplates supplemental regulation, *San Diego Building Trades Council* v. *Garmon*, 359 U.S. 236 (1958), or, as in this case, one which not only defines the federal regulatory role but also defines the regulatory role of the states. It is this feature of the FWPCA legislation which gives a unique twist to the preemption analysis, for it imposes the obligation not only to prevent conflict between the paramount federal regulatory scheme and state police power, but also to avoid conflict between the regulatory system adopted by source states carrying out the FWPCA program and the exercise of power by non-source states, while reflecting the distinction Congress made between the regulatory power of source states and the consultative role of non-source states.

It is almost inconceivable that Congress, having taken pains to avoid multiple regulation of a single source, would enact a system detailing and limiting the power of a source state to exercise regulatory jurisdiction, but at the same time foster a comprehensive jurisdiction of non-source states without limitation or standards or a federal umpire to prevent conflicts. As this Court has held, the FWPCA is "an all encompassing program of water regulation" intended to "establish a *comprehensive* long range policy for the elimination of water pollution," *Milwaukee II*, 451 U.S. at 318 (emphasis in original). Respondents can point to no evidence that it was intended merely to provide a policy for federal and source state regulation which could be altered, perhaps radically, by the uncontrolled exercise of the police power of non-source states.

Respondents argue that the FWPCA is not comprehensive because "[n]owhere in the FWPCA is provision made

for remedying inevitable pollution-caused private injuries," Brief of Respondents, p. 30, and cite *Silkwood* v. *Kerr-McGee*, 464 U.S. 238 (1983), for the proposition that this Court will infer a state based damage remedy if none is afforded by the federal statute. This effort to analogize the scheme embodied in the FWPCA to the regulatory scheme for nuclear plants with which this Court dealt in *Silkwood* is unavailing. It disregards the central fact that the Court in *Silkwood* faced two federal statutes dealing with nuclear plant safety, the Atomic Energy Act of 1954, 42 U.S.C. §§ 2011 *et seq.*, which assigned exclusive regulatory jurisdiction over plant safety to the Nuclear Regulatory Commission, and the Price-Anderson Act, 42 U.S.C. § 2210(a), which reflected a congressional purpose to retain private state law damage remedies for injuries occasioned by the operation of such plants. In these circumstances, the primary issue for consideration was the reconciliation of the Price-Anderson Act policy of preserving the availability of state law damage remedies with the NRC's exclusive role as a regulator. Thus, in *Silkwood*, unlike this case, both the NRC's jurisdiction *and* the states' tort jurisdiction were supported by federal legislation, and, at least from the standpoint of preemption, the analysis dealt with reconciling conflicting *federal* policies.

Unlike *Silkwood*, there is built into the statutory scheme of the FWPCA a clear federal purpose to accord comprehensive regulatory jurisdiction over a given source to a *single* entity, either a federal authority or a source state authority which displaces the federal authority by satisfying the requirements laid down by the FWPCA. § 402(c), 33 U.S.C. § 1342(c) (A45-46). There is no federal policy expressed in the statute, or implicit in the statute, which supports a conflicting exercise of non-source state jurisdiction.

Nor do Respondents' contentions concerning "the historic interest of the states in providing precisely the relief withheld in the Act," Brief of Respondents, p. 30,* withstand scrutiny in the context of the federal/source state partnership established by the FWPCA. As we have urged in our main brief, the scheme created by the Act contemplates a broad discretion in the source state to exercise its regulatory jurisdiction to the fullest, and by any means it finds suitable, so long as it satisfies the FWPCA criteria. Brief of Petitioner, p. 11. Thus, while the statute does not contemplate any federal law damage remedy, it permits damage actions under the laws and in the courts of the source state.

Moreover, as is evidenced by the Act itself, Congress plainly took into account the interests of the federal government, the source state, and the non-source state in determining the balance most likely to achieve the underlying purposes of the Act. Congress itself expressly chose to subordinate the interests of non-source states to those of both source states and the federal government. See Brief of Petitioner, pp. 10-13.

As the Seventh Circuit observed in *Milwaukee III*,

> "[F]or a number of different states to have independent and plenary regulatory authority over a single discharger would lead to chaotic confronta-

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* Whether a state has an "historic interest" in providing a remedy for discharges into interstate waters from a second state is at best problematic. Although Respondents cite a number of cases where state X has entertained an action for an injury in state X resulting from an event in state Y, they cite—and we have found—no case before *Ohio* v. *Wyandotte Chemicals Corp.*, 401 U.S. 493 (1971), where the event in state Y was a discharge into interstate waters. Such actions seem to have been treated historically as federal law, not state law, claims.

> tion between sovereign states. Discharger would be forced to meet not only the statutory limitations of all states potentially affected by their discharges but also the common law standards developed through case law of those states. It would be virtually impossible to predict the standard for a lawful discharge into an interstate body of water. Any permit issued under the [FWPCA] would be rendered meaningless." 731 F.2d at 414.

Certainly, at a minimum, this is a situation where "the imposition of a state standard in a damages action would frustrate the objectives of the federal law." *Silkwood* at 256.

Such a conclusion applies equally whether the state standard is imposed through the abatement of a nuisance under state law or through the award of either compensatory or punitive damages. The United States now contends, Brief of the United States as *Amicus Curiae*, pp. 22-24, that although the application of a non-source state's law to abate a source located in another state or to award punitive damages for harm originating out-of-state would conflict with the federal statutory scheme, the award of compensatory damages in an action involving private parties is not sufficiently "regulatory" to be preempted by the FWPCA. This argument, however, fails to consider that an award of damages, particularly for a continuing nuisance, has as much potential for completely disrupting the business of a discharger—and thus interfering with the mechanisms of the Act—as an abatement.*

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* As Respondents suggest (Brief of Respondents, pp. 35-37), the United States' labored effort to introduce into this case the distinction between "compensatory" and "regulatory" state law remedies that it argued, and lost, in *Silkwood*, finds no basis in the language of the FWPCA or in its legislative history. As argued in this case,

(footnote continued on following page)

As this Court has recognized in other contexts, *see, e.g., San Diego Bldg. Trades Council* v. *Garmon, supra,* the power to award damages, even if restricted to "compensatory" damages, provides a means for a non-source state to impose more stringent regulatory requirements on a discharger than the federal agency or a source state agency regard as appropriate, in direct contravention of the scheme established by Congress. The FWPCA does not merely preempt those state laws which conflict with the Act's ultimate goals; its preemptive effect extends to all state remedies whose imposition would conflict with the means by which these goals were intended to be achieved. *Cf. Hines* v. *Davidowitz,* 312 U.S. 52 (1941); *Perez* v. *Campbell,* 402 U.S. 637, 651-52 (1971) (effect of state statute, rather than purpose, governs preemption analysis). Allowing a non-source state to exercise power over a discharger located in another state would plainly interfere with the scheme embodied in the FWPCA and thus impede the achievement of the goals underlying the Act.

II.

To Make the FWPCA Effective, Only the Law of the Source State in the Courts of the Source State May Be Applied to Interstate Water Disputes.

Respondents contend that by arguing that any nuisance action brought under the law of the source state must be brought in a state or federal court in the source state,

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(footnote continued from preceding page)

the purported distinction seems singularly arid, especially in view of the added suggestion, Brief of the United States as *Amicus Curiae,* p. 28, that although a court applying the law of a non-source state cannot grant "regulatory" remedies directly, it can impose such remedies if, under the source state's choice of law principles, it would grant "regulatory" remedies based on the law of the non-source state.

"Petitioner in effect is asking this Court to develop a wholly new common law rule of subject matter jurisdiction." Brief of Respondents, p. 38. According to both Respondents and the United States, this argument "equates legislative jurisdiction with judicial jurisdiction." Brief of Respondents, p. 38; Brief of United States as *Amicus Curiae*, p. 16. Neither of these arguments suggests a valid criticism of Petitioner's position.

It is not Petitioners who have suggested "a new common law of subject matter jurisdiction." Rather, the Seventh Circuit, in *Milwaukee III*, inferred from the scheme of the FWPCA as a necessary corollary to avoid conflict, an implicit rule of forum choice, which the Seventh Circuit (and the Solicitor General, *see* Brief for the United States in *Milwaukee III*, p. 13 n.12),* thought to be consistent with sound implementation of the comprehensive regulatory scheme it enacted.

The analysis of legislative jurisdiction *and* judicial jurisdiction necessarily starts with the statutory scheme Congress enacted and the consequences which flow from that enactment. After concluding that the FWPCA supported the competency of the source state to regulate interstate water sources by entertaining actions for damages and abatement, the Seventh Circuit concluded, correctly in our view, that it is necessary to confine such actions to courts in the source state if the careful balance of federal, source state and non-source state interests established in the FWPCA is to be maintained and the efficacy of the federal scheme preserved. Unless such a limitation is implied, dischargers located on

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* The Solicitor General fails to offer any explanation for the contradiction between its present position and its endorsement of the Seventh Circuit's holding in *Milwaukee III* that federal courts in non-source states were precluded from entertaining actions against discharges into interstate waters from another state.

interstate bodies of water may be sued in every state on which that body of water touches. Even if the law applied in each instance is substantively the law of the source state, the goals of avoiding interstate conflict and ensuring a comprehensive, non-duplicative and effective system of pollution control that Congress sought to achieve in enacting the statute would be frustrated. Given the "vague" and "indeterminate" nature of the common law of nuisance, *Milwaukee II*, 451 U.S. at 317, allowing the law of the source state to be applied in the courts of other states would create the same potential for conflict as allowing each state to apply its own substantive law.

The entirety of the source state's law, including private actions to abate or compensate for a discharge into interstate waters, must be seen as an implementation of the FWPCA's decision to allocate the regulation of such discharges to the source state, if it chooses to act in conformity with federal statutory criteria. The choice of forum to carry out the source state's total regulatory scheme is as much an aspect of the implementation of such regulation as is the choice of substantive law. Sensible implementation of the express congressional direction to give paramountcy to source state regulation and to avoid multiple regulation compels allocation of the responsibility for enforcement of the source state's substantive law to the courts in the source state as the only effective means of avoiding multiple regulation and conflicting applications.

Conclusion

The FWPCA reflects an all-encompassing federal scheme to regulate the use of navigable and interstate waters, a scheme which assigns a paramount role to source state regulation so long as such regulation meets minimal federal requirements. This is a scheme that ensures a uniform and comprehensive system of regulation and avoids the disruptive and intrusive effects of multi-state regulation. The efficacy of this federal scheme, however, depends entirely on preserving the careful balance Congress established between federal, source state and non-source state interests. The construction of the FWPCA adopted by the Courts below and urged by both Respondents and the United States, a construction premised on a misapprehension of the fundamental nature of the act, emasculates the federal scheme and effectively destroys its ability to deal adequately and appropriately with the significant problems it was designed to address. Such a construction must be rejected if the FWPCA is to be given the effect intended by Congress.

Dated: New York, New York
September 4, 1986

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